APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
November 15, 2005 Session

STATE OF TENNESSEE v. JAMES RIELS

Direct Appeal from the Criminal Court for Shelby County
No. 03-06530 Chris Craft, Judge

No. W2004-02832-CCA-R3-DD - Filed March 31, 2006

[Deleted: Introductory Paragraph]

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and J.C. MCLIN, JJ., joined.

Tony N. Brayton, Garland Erguden, and Robert Wilson Jones (on appeal) and Larry Nance and LaTonya Burrow (at trial), Memphis, Tennessee, for the appellant, James Riels.

Paul G. Summers, Attorney General and Reporter; Michelle Chapman McIntire, Assistant Attorney General; William L. Gibbons, District Attorney General; and Gerald Harris and Michelle Parks, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

[Deleted: I. Factual Background]

II. Analysis

A. Suppression of Statement to Police

Before trial, the appellant filed a motion to suppress his statement to law enforcement officers and all evidence seized as a result of the search of his home. In support of the motion, the appellant asserted that (1) he was arrested without probable cause, and (2) the consent to search his home was not knowingly made because he was under the influence of cocaine at the time. A hearing on the motion to suppress was held on December 18, 2003, during which the following proof was presented:

Sergeant James Fitzpatrick testified that on April 22, 2003, he went to a home at 3810 Shirlwood in the Highland/Walnut Grove area of Memphis. Upon arriving at the scene, he

discovered one homicide victim, Mary Jane Cruchon, and one victim, Franchion Pollack, who was still alive. Pollack was transported to The Med for treatment but later died of her injuries. Sergeant Fitzpatrick acknowledged that this was "a fairly violent and fairly bloody homicide" and that a dog also had been killed. Sergeant Fitzpatrick stated that there were no suspects. He observed, however, that there were no signs of forcible entry to the home and that the house was in the process of being remodeled. The general contractor was Allen Johnson, and law enforcement began questioning all of Johnson's employees who had worked on the residence. Officer Timothy Sims obtained the names of Johnson's employees. Law enforcement was aware that the last vehicle seen at the residence was a red Ford F-150 pickup truck with ladders or ladder racks.

Sergeant Fitzpatrick testified that on April 24, 2003, at approximately 3:00 p.m., the appellant and his mother arrived at the Memphis Police Department Homicide Office. The appellant was calm and cooperative, and Sergeant Fitzpatrick saw no indication that the appellant was under the influence of any drugs or alcohol. At that point, the appellant was neither a suspect nor was he under arrest, and he was not handcuffed or shackled. The appellant provided Sergeant Fitzpatrick with an account of his activities on April 21, 2003, beginning with his having gone to Pollack's home. He related that he worked there until a piece of equipment broke down. He spent the next hours unsuccessfully looking for a replacement part, cleaning his equipment, and completing some work that he was directed to do by Cruchon. The appellant then left the residence and went home to change clothes. He reported that he returned to Pollack's home "to leave a ladder and then he said to pick up a ladder, and ultimately he left some . . . paint at the house before leaving and going to find a friend." The appellant stated that he had left three gallons of paint near the patio door. Sergeant Fitzpatrick testified that this statement raised concern because the patio doors were open when officers arrived at the scene, and there was no paint observed at the house. This statement, however, did not elevate the appellant to a suspect, "but it did ring a bell . . . to look at him a little closer." The appellant also confirmed to officers that he was in possession of a red Ford F-150 pickup, which was a work truck owned by Allen Johnson. The appellant further related that when he left Pollack's house, he went to find an acquaintance, Tammy Stafford, to try to get some cocaine. Officers questioned Stafford about 4:30 p.m. Her account of the events on April 21 were inconsistent with the appellant's statement.

In light of the information provided by Stafford, law enforcement officers asked the appellant if he would consent to a search of his mother's house, his place of residence. The appellant replied "that he had no problem with that, and he signed the records of document giving us consent to search his . . . quarters within his mom's home." The appellant did not have any questions about the consent to search form and signed the form about 4:30 p.m. Officer Sims and another officer then went to the appellant's mother's home, where she signed a consent to search the entire premises. While the officers were conducting the search, the appellant remained in an interview room at the police department. He was not handcuffed, and Sergeant Fitzpatrick stated that he would "stick [his] head in from time to time." He maintained that the appellant was not a suspect at that time and that other information was being checked.

At 7:45 p.m., Officer Sims notified Sergeant Fitzpatrick that he had found blood-spattered work clothes and work boots at the appellant's residence. Sergeant Fitzpatrick informed the appellant that he was under arrest and shackled him. Specifically, Sergeant Fitzpatrick put a shackle

"on his ankle, shackled him to one of the chairs in the interview room." The appellant did not request an attorney and did not ask any questions about his legal rights. The appellant was then left in the interview room.

The officers returned from the appellant's residence and consulted with Sergeant Fitzpatrick. The appellant was informed of the evidence discovered at his residence and was advised of his legal rights. The appellant indicated that he wanted to give a statement. Officers took him from the interview room to the general Homicide Office, a transcriptionist was obtained, and the appellant signed an advice of rights form at 8:50 p.m. The appellant gave a seven-page statement immediately thereafter, admitting his involvement in the crimes. He signed and approved the statement at 10:45 p.m.

Sergeant Fitzpatrick described the appellant as "somewhat remorseful" while giving his confession. The appellant was not very talkative but responded to questions. The appellant did not appear to be under the influence of cocaine. Sergeant Fitzpatrick remarked that the appellant appeared to be "quite familiar with the Advice of Rights." At no time did the appellant request an attorney. The appellant never inquired as to his legal rights and never indicated that he did not want to talk to the officers. During the period between 4:30 p.m. and 7:30 p.m., the appellant was basically left alone in the interview room. At some point, another officer asked if the appellant wanted anything to eat or drink. Sergeant Fitzpatrick admitted that the interview room was locked and that the appellant could not leave the room without knocking on the door. Sergeant Fitzpatrick stated that the appellant never asked to leave, but he could not answer whether the appellant would have felt that he was not free to leave prior to his actual arrest at 7:30 p.m.

Officer Timothy Sims testified that he spoke with Allen Johnson and that Johnson told him the appellant had been driving a red pickup truck. Officers knew that a red pickup could have been the last vehicle seen at Pollack's home. When the appellant and his mother came to the police department, they appeared happy to help the police officers with anything they needed in the case. Neither of them requested a lawyer, and Officer Sims observed that the appellant was smiling. Officer Sims and Sergeant Fitzpatrick interviewed the appellant briefly "to find out if he had seen anything unusual at the address on Shirlwood." Officer Sims told the appellant that he wanted to see the clothes that the appellant had been wearing on the day of the crimes, and the appellant signed a consent to search form. Officer Sims and another officer went to the appellant's home and informed his mother that they were looking for the clothes worn by the appellant on Tuesday, April 22. Ms. Gibson informed the officers that the appellant had "put some boots and some jeans in the garbage can." Ms. Gibson went to a garbage can located in the driveway and retrieved a "plastic bag with some boots and a pair of jeans, and inside she ripped it open." The items appeared to have blood on them.

Officer Sims returned to the police department, told the appellant that he was under arrest, and read the appellant an advice of rights form. He had the appellant read the form back to him, and the appellant appeared to understand his rights. Officer Sims and Sergeant Fitzpatrick interviewed the appellant, and the appellant admitted to the crimes. While the appellant was giving his statement, the statement was being typed. After his interview, the appellant reviewed the written statement, made corrections, and signed it. He never requested an attorney, appeared to have a good

memory, and did not appear to be under the influence of any drugs.

At the conclusion of proof, the trial court made the following findings of fact and conclusions of law:

> Okay. Well, looking at -- we have three issues here. First two, I think, are immediately resolvable. The . . . Defense is trying to suppress the written statement, the arrest of the defendant and any products from it, and the property that was seized at the house of the mother or his house where he was living.
>
> Find from the facts that the property at the house was taken pursuant to a Consent To Search signed by him voluntarily, a Consent To Search signed by his mother voluntarily, and also that she turned those items over to the police as a lay person so that there are no -- this was not an unconstitutional seizure [or] search of his property.
>
> His arrest was only made after probable cause was found when Officer Sims found the suspected bloody clothing, along with everything else, called Officer Fitzpatrick and he placed the defendant under arrest. At that point they had probable cause to arrest him and it was only at that point that he was shackled, ankle shackled to his chair.
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> So I find the arrest was lawful and not unconstitutional. It was not an unconstitutional seizure of his person.
>
> As far as the statement's concerned the question is going to be whether or not Miranda was violated, whether or not he was -- it was a custodial interrogation prior to the time the statement was taken. His statement was not taken until he was read his rights and so there's not a problem with the statement itself unless it was a fruit of a poison tree.
>
> In other words unless the information given by the suspect in his interview was given unconstitutionally and which then led to other investigation, talking to the prostitute, talking about the clothes, seizing his property which then made the seizure the fruit of the poisonous tree as it were.
>
> Looking at whether or not he was in custody during the preliminary interview I'm just going to put a couple of cases on the record. . . . State vs. Anderson . . . the relevant inquiry in determining whether an individual's in custody . . . is whether under the totality of the circumstances a reasonable person in the suspect's position would consider himself . . . deprived of freedom of movement to a degree associated with a formal arrest.
>
> . . . .
>
> And in this case the defendant voluntarily went down to the station house with his

> mother. Even if it were proved, and there is no proof that she forced him to go to the house as his mother, that still would not be State action.
>
> But she brought him down there, he was not handcuffed, the door was open, closed, open, closed all during the day. He never asked to leave, was never handcuffed until after he was formally arrested.
>
> The information that he gave the police during this interview was . . . general stuff, general investigative questions . . . .
>
> Under those circumstances the proof that I have here I don't find that he was -- that he would have felt that he was not free to leave . . . .
>
> [H]e was not in custody, and because of that any interview that the police took of him, along with all the other witnesses, was not in custodial interrogation and there was nothing about that interview that was unconstitutional so that any fruit from that interview would lead to a Mirandized confession which would be fruit of the poisonous tree.

The appellant contends that the trial court erred by overruling his motion to suppress his consent to search his home and his alleged statement. In support of his motion to suppress, he argues that law enforcement officers violated his constitutional rights against unreasonable seizure and his privilege against self-incrimination.

This case involves a review of the trial court's findings of fact and conclusions of law in denying a motion to suppress evidence. Because issues of whether a defendant was placed in custody, interrogated, and voluntarily gave a confession are primarily issues of fact, we review these factual determinations by the trial court according to the standard set forth in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Under the Odom standard, an appellate court will not disturb the facts found by the trial court unless the evidence preponderates against the lower court's findings. Id. (citing Odom, 928 S.W.2d at 23). "Questions about witness credibility and 'resolution of conflicts in the evidence are matters entrusted to the trial judge.'" Id. (quoting Odom, 928 S.W.2d at 23). Moreover, the "[t]estimony presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress." State v. Perry, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999). Notwithstanding this deference to the trial court's findings of fact, our review of a trial court's application of law to the facts is conducted under a de novo standard of review. Walton, 41 S.W.3d at 81; State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999); State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

1. Custody

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." These

procedural safeguards require that police officers must advise a defendant of his or her right to remain silent and of his or her right to counsel before they may initiate custodial interrogation. State v. Sawyer, 156 S.W.3d 531, 533 (Tenn. 2005). If these warnings are not given, statements elicited from the individual may not be admitted in the prosecution's case-in-chief. Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528 (1994). A waiver of constitutional rights must be made "voluntarily, knowingly, and intelligently." Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. In determining whether a defendant has validly waived his Miranda rights, courts must look to the totality of the circumstances. State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992).

Miranda warnings are required when a person is subject to custodial interrogation by law enforcement. See Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. "Custodial" means that the subject of questioning is in "custody or otherwise deprived of his freedom by the authorities in any significant way." Id. at 478, 86 S. Ct. at 1630. Our supreme court has expanded this definition of custodial to mean "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996). This test is "objective from the viewpoint of the suspect, and the unarticulated, subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question." Id. In determining whether a reasonable person would consider himself or herself in custody, we review a variety of factors, including

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id.

Because this was a motion to suppress, we must accredit the trial court's findings of fact. The trial court accredited the testimony of the law enforcement officers, and the evidence in the record does not preponderate otherwise. When we apply the Anderson factors to the facts testified to at the suppression hearing, we determine that the appellant was not in custody under the totality of the circumstances. The appellant's initial presence at the Memphis Police Department Homicide Office on April 24 was for the purpose of gathering facts in the investigation of Cruchon's murder and Pollack's assault. The police contacted the appellant at approximately 10:00 a.m. that morning, but the appellant did not arrive at the police department until 3:00 p.m. that afternoon. The appellant's mother accompanied him to the police department, and although the appellant was placed in an interview room, the record does not reflect that he was deprived of his freedom of action in any significant way. Specifically, there is no indication that the appellant was prevented from leaving

the interview room, and the appellant was left unattended in the room for large amounts of time. The interactions between the officers and the appellant were cooperative and cordial. The officers testified that the appellant was calm, cooperative, and smiling and that the appellant was not under arrest at that time.

The testimony at the suppression hearing revealed that the appellant became a suspect when Officer Sims discovered the appellant's bloody clothing. Officer Sims contacted Sergeant Fitzpatrick, and Fitzpatrick immediately arrested the appellant. When Officer Sims returned to the police department, he advised the appellant of his Miranda rights. The record reflects that the appellant did not request a lawyer and made incriminating statements after he was advised of his rights and waived those rights. We conclude the trial court did not err by denying the appellant's motion to suppress his statement.

2. Consent to Search

"A warrantless search is presumed unreasonable under both the federal and the state constitutions, and evidence seized from the warrantless search is subject to suppression unless the State demonstrates by a preponderance of the evidence that the search was 'conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.'" State v. Chearis, 995 S.W.2d 641, 643 (Tenn. Crim. App. 1999) (quoting State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998)). Two exceptions to the warrant requirement include a search incident to arrest and a search conducted pursuant to consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973).

"[T]o pass constitutional muster, consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992). The question of whether the appellant voluntarily consented to the search is a question of fact which focuses upon the totality of the circumstances. Schneckloth, 412 U.S. at 227, 93 S. Ct. at 2048. The pertinent question is whether the defendant's act of consenting is "'the product of an essentially free and unconstrained choice.'" Id. at 225, 93 S. Ct. at 2047 (quoting Culombe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879 (1961)). If the defendant's "'will was overborne and his capacity for self-determination critically impaired,'" due process is offended. Id. at 225-26, 93 S. Ct. at 2047 (quoting Culombe, 367 U.S. at 602, 81 S. Ct. at 1879). The following factors are used to evaluate the voluntariness of the consent: (1) whether the defendant is in custody; (2) the length of detention prior to the giving of consent; (3) the presence of coercive police procedures; (4) the defendant's awareness of the right to refuse to consent; (5) the defendant's age, education, and intelligence; (6) whether the defendant understands his constitutional rights; (7) the extent of the defendant's prior experience with law enforcement; and (8) whether the defendant was injured, intoxicated, or in ill health. See, e.g., State v. Carter, 16 S.W.3d 762, 769 (Tenn. 2000).

Knowledge of the right to refuse consent has also been included as a factor. Schneckloth, 412 U.S. at 227, 93 S. Ct. at 2048. Moreover, the State must show "more than acquiescence to a claim of lawful authority." Bumper v. North Carolina, 391 U.S. 543, 549, 88 S. Ct. 1788, 1792 (1968). The burden of proof rests upon the State to show, by a preponderance of the evidence, that the consent to a warrantless search was given freely and voluntarily. Id. at 548; 88 S. Ct. at 1792.

"The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." Florida v. Bostick, 501 U.S. 429, 439, 111 S. Ct. 2382, 2389 (1991); Schneckloth, 412 U.S. at 243, 93 S. Ct. at 2056 (holding that "there is nothing constitutionally suspect in a person's voluntarily allowing a search").

Using the factors applicable to the present case, we examine the totality of the circumstances by first considering the appellant's personal characteristics. The appellant was twenty-eight years old at the time of the crimes. While the record is silent as to his intelligence, the record indicates that he had an eleventh grade education. The officers testified that the appellant did not appear to be intoxicated or under the influence of any substance and that the appellant was calm and cooperative. The record shows that the appellant had a prior history of arrests at the time his consent was given. This fact demonstrates a presumptive familiarity with the criminal justice system.

The appellant also signed the consent to search form. The consent form provided that the appellant was advised of his right to refuse to consent to the search. The appellant's consent was given to the search of his premises at "4659 Wicklow," where he lived with his mother, Sherry Gibson, and she also signed a consent to search form. The consent to search form provided that Ms. Gibson was advised of her right to refuse to consent to the search. At the residence, officers informed Ms. Gibson that they were looking for the clothing worn by the appellant on Tuesday, April 22. Ms. Gibson voluntarily went to the garbage can located in the driveway, retrieved a garbage bag from the garbage can, and gave the bag and its contents to the officers. The appellant and his mother had a common possessory interest in the property to be searched, and either could grant valid consent to search the property. See State v. Bartram, 925 S.W.2d 227, 230-31 (Tenn. 1996). "'Voluntary consent requires sufficient intelligence to appreciate the act as well as the consequence of the act agreed to.'" (Thurman v. State, 455 S.W.2d 177, 180 (1970) (quoting 79 C.J.S. Searches and Seizures § 62(b)). Nothing in the record contradicts the trial court's finding that the appellant voluntarily gave consent. We conclude that under the facts of this case, the appellant knowingly, intelligently, and voluntarily consented to the search of the premises at 4659 Wicklow. Similarly, the evidence demonstrates that Sherry Gibson's consent also was voluntary. Finally, no constitutional violation is apparent from the fact that the appellant's mother, at a time when the appellant was still living at her home, supplied police officers with the appellant's clothing. No search was involved, and the evidence supports a conclusion that the mother's cooperation was voluntary. The clothing was located in a garbage can in the driveway, an area clearly under Ms. Gibson's control and not within the exclusive control of the appellant. The search and the fruits thereof withstand constitutional scrutiny. The appellant is not entitled to relief on this issue.

[Deleted: B. Cross-examination of the Appellant]

[Deleted: C. Photograph of Victim]

[Deleted: D. Apprendi/Ring Violation as to (i)(2) Aggravator]

[Deleted: E. Instruction on Victim Impact Testimony]

F. Constitutionality of Tennessee's Death Penalty Statutes

The appellant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Upon review, we conclude that the appellant's specific complaints have been previously rejected by the courts of this state. In light of this fact, we acknowledge that the appellant must raise these issues to preserve them for review by a higher court. We briefly address each challenge made by appellant.

First, the appellant asserts that Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants, thereby rendering Tennessee death penalty statutory scheme unconstitutional. Specifically, he argues that the statutory aggravating circumstances set forth in Tennessee Code Annotated section 39-13-204(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted, whether viewed singly or collectively, that they fail to provide a "meaningful basis" for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death. We note that factor (i)(6) does not pertain to this case as this factor was not relied upon by the State nor found by the jury. Thus, any individual claim with respect to this factor is without merit. See, e.g., State v. Hall, 958 S.W.2d 679, 715 (Tenn. 1997); State v. Brimmer, 876 S.W.2d 75, 86 (Tenn. 1994). Moreover, the appellant's argument has been rejected by our supreme court on numerous occasions. See Vann, 976 S.W.2d at 117-18 (appendix); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).

Second, the appellant argues that the imposition of the death penalty in this state is unconstitutional because the death sentence is imposed capriciously and arbitrarily. Specifically, he contends that unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty. However, this argument also has been rejected. See State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995). The appellant also contends that the death penalty is imposed in a discriminatory manner based upon race, geography, and gender. Once again, this argument has been rejected. See Id.; Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 23 (Tenn. 1993). He argues that requiring the jury to agree unanimously to a life verdict violates Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860 (1988), and McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227 (1990). This argument has been rejected. See Brimmer, 876 S.W.2d at 87; State v. Thompson, 768 S.W.2d 239, 250 (Tenn. 1989). The appellant also contends that there is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances. This argument also has been rejected. See Thompson, 768 S.W.2d at 250-52.

Third, the appellant asserts that the appellate review process in death penalty cases is constitutionally inadequate. Our supreme court has rejected this argument also. See Cazes, 875 S.W.2d at 270-71; State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992). Moreover, the supreme court has held that "[w]hile important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997).

[Deleted: G. Review Pursuant to Tenn. Code Ann. § 39-13-206(c)]

[Deleted: III. Conclusion]